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No. 99-___

In The

Supreme Court of the United States

SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1, a Public Employer and Political Subdivision of the State of Washington,

Cross-Petitioner,

v.

GARY COLLINS, *et al.*,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED

In light of the Court's decision to grant certiorari in *Christensen v. Harris County*, No. 98-1167, 1999 U.S. LEXIS 6902 (U.S. Oct. 12, 1999) ("*Christensen*"), should the Court grant certiorari to decide whether the Ninth Circuit Court of Appeals erred in holding that the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (the "FLSA"), does not prohibit a public employer from compelling its employees to use their accrued compensatory time, where the employer and the employees' union have negotiated and entered into a collective bargaining agreement and the employer acted in accordance with that agreement when compelling its employees to use compensatory time?

PARTIES

Defendant-Appellee below and Cross-Petitioner in the Court (the "Fire District"):

> Spokane County Fire District No. 1, a Public Employer and Political Subdivision of the State of Washington

Plaintiffs-Appellants below and Cross-Respondents in the Court (the "Firefighters"):

> Gary Collins
> Dennis Doyle
> Gary Ghirarduzzi
> Bruce Hamner
> Don Matthews
> Jeff McLaughlin
> Wayne McLaughlin
> Jeff Miner
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OPINIONS BELOW

The Fire District refers the Court to the Firefighters' Petition for Writ of Certiorari in this case, which was filed with the Court on October 5, 1999, and assigned docket number 99-592 ("Petition for Writ of Certiorari"). *See* Petition for Writ of Certiorari at 1-2, App. A-B. Since the filing of the Petition for Writ of Certiorari, the Ninth Circuit decision below has been published. *See Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999), *petition for cert. filed*, (October 5, 1999).

JURISDICTION

The Ninth Circuit entered judgment in the present case on August 24, 1999. The Firefighters filed the Petition for Writ of Certiorari on October 5, 1999, and the petition was docketed by the Court on that date. The Fire District invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

See Petition for Writ of Certiorari at 2, App. C-D.

INTRODUCTION

The Fire District respectfully requests that the Court grant this cross-petition for writ of certiorari, which seeks review of the Order of the Ninth Circuit dated August 24, 1999, in light of the Court's decision to grant the petition

for writ of certiorari in *Christensen*. Resolution of the issue in *Christensen* will affect the outcome in this case, as this case presents a related question. This case, however, presents a factual pattern different from *Christensen* which, in the Fire District's view, should be considered in resolving the overall issue presented by both *Christensen* and the present case. Therefore, the Fire District respectfully requests that the Court consider this case in connection with the *Christensen* case.

STATEMENT OF THE CASE

The Fire District refers the Court to the "Statement of the Case" set forth in its Opposition to Petition for a Writ of Certiorari, which was filed with the Court, along with this brief, under the docket number 99-592.

SUMMARY OF THE ARGUMENT

In light of the Court's decision to grant the petition for writ of certiorari in *Christensen*, the Fire District respectfully requests that the Court grant this cross-petition. The petition for writ of certiorari in *Christensen* was based on a conflict between the Fifth Circuit in that case (*see Moreau v. Harris County*, 158 F.3d 241 (5th Cir. 1998), *cert. granted, in part, sub nom. Christensen v. Harris County*, 1999 U.S. LEXIS 6902 (U.S. Oct. 12, 1999)) and the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994) ("*Heaton*"). The question before the Court in *Christensen* is

> [w]hether a public agency governed by the compensatory time provisions of the Fair Labor

> Standards Act of 1938, 29 U.S.C. 207(o), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

1999 U.S. LEXIS 6902, at *1 (U.S. Oct. 12, 1999). The present case similarly involves compelled use of compensatory time. But this case, unlike *Christensen* and *Heaton*, involves a preexisting agreement regarding use of compensatory time. Therefore, this case should be considered by the Court along with *Christensen*.

In this case, the Fire District and International Association of Fire Fighters Local 876 (the "Union") negotiated an agreement regarding the preservation and use of compensatory time and included the compensatory time provision in their collective bargaining agreement (the "collective bargaining agreement"). The Fire District, when ordering the Firefighters to schedule one or two shifts of compensatory time off within a one-month period, acted in accordance with that agreement.[1] On the other hand, the employers in both *Christensen* and *Heaton* did not act in accordance with a negotiated agreement. Rather, in those cases, the employers *did not have an agreement* with their employees or their employees' representatives pursuant to which the employers compelled their employees to use compensatory time.

---

[1] The Ninth Circuit followed the Fifth Circuit in *Christensen* and chose not to rely on the terms of the parties' agreement concerning compensatory time. Rather, the Ninth Circuit ruled, consistent with the Fifth Circuit's ruling in *Christensen*, that even in the absence of an agreement, the FLSA does not prohibit employers from compelling employees to use compensatory time. *See* Petition for Writ of Certiorari at App. A10-A11.

In light of this factual difference between *Christensen* and *Heaton* and the present case, the Fire District respectfully requests that the Court grant this cross-petition for writ of certiorari and consider this case along with *Christensen*.

REASONS FOR GRANTING THE WRIT[2]

The parties in this case, unlike the parties in *Christensen* and *Heaton*, entered into a collective bargaining agreement that governs the preservation and use of compensatory time. Consistent with that agreement and the understanding between the parties, as the Firefighters' accrued compensatory time approached the 144-hour cap, the Fire District ordered the Firefighters to schedule one or two shifts of their compensatory time within a one-month period. In other words, the Fire District, unlike the employers in *Christensen* and *Heaton*, ordered the Firefighters to schedule compensatory time pursuant to the negotiated agreement between the parties. This case therefore presents a factual scenario that was not considered by the Fifth and Eighth Circuits in *Christensen* and *Heaton* – a scenario that should be considered by the

[2] The facts herein are based on the Ninth Circuit opinion, the District Court opinion, and the factual record below. The Ninth Circuit and District Court opinions have been reproduced and attached as Appendix A and Appendix B, respectively, to the Petition for Writ of Certiorari. Citations to the factual record below are abbreviated as "ER" for Excerpts of Record and "SER" for Supplemental Excerpts of Record.

Court when ruling in connection with the *Christensen* case.

A. THE FIRE DISTRICT ORDERED THE FIREFIGHTERS TO SCHEDULE COMPENSATORY TIME IN ACCORDANCE WITH A NEGOTIATED COLLECTIVE BARGAINING AGREEMENT.

1. The FLSA Permits a Public Employer to Enter Into an Agreement With the Union Regarding Compensatory Time.

Under the FLSA, public employers may enter into agreements with their employees that provide for payment of compensatory time off in lieu of overtime pay. Under Section 7 of the FLSA, compensatory time can exist only pursuant to (a) a negotiated agreement between the employer and the employees' representative or (b) for unrepresented employees, an agreement between the employer and the employees themselves. Specifically, Section 7 provides, in relevant part:

> Compensatory time
>
> (1) Employees of a public agency which is a . . . political subdivision of a State . . . may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only –
>
> (A) pursuant to –

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . .

29 U.S.C. § 207(*o*).

2. The Fire District and the Union Negotiated a Compensatory Time Provision as Part of Their Collective Bargaining Agreement.

In the present case, in accordance with 29 U.S.C. § 207(*o*)(2)(A)(i), the Fire District and the Union negotiated and entered into a collective bargaining agreement that contains a compensatory time provision. That provision includes a 144-hour cap on accrual of compensatory time, after which the Fire District must pay employees at time and one-half for their services. SER 164, 185. Undisputedly, in negotiating the compensatory time provision, neither the Fire District nor the Union contemplated that employees would be routinely paid time and one-half for their services. Rather, the compensatory time arrangement was always intended to be a mechanism by which employees performed additional tasks outside their regular duties in exchange for time off. ER 35, ¶ 2.

3. In Accordance With the Negotiated Agreement, the Fire District Ordered the Firefighters to Schedule Compensatory Time.

The Fire District and the Union negotiated the compensatory time provision in the collective bargaining agreement with the understanding that the Fire District would allow employees to perform special assignments in exchange for time off. However, contrary to the undisputed intent behind the compensatory time provision, the Firefighters accrued compensatory time and did not use it. SER 164. Therefore, as the Firefighters' accrued compensatory time approached the 144-hour cap, the Fire District ordered them to schedule one or two shifts of compensatory time off within a one-month period. SER 165. This order was entirely consistent with the collective bargaining agreement and the understanding and intent of the parties when negotiating that agreement.

B. *CHRISTENSEN* AND *HEATON* DO NOT INVOLVE A NEGOTIATED AGREEMENT BETWEEN THE PARTIES.

The employers in both *Christensen* and *Heaton* did not act pursuant to a negotiated compensatory time provision. Rather, in both cases, the plaintiffs agreed to accept compensatory time in lieu of cash overtime under 29 U.S.C. § 207(*o*)(2)(A)(ii). *See* Brief for the United States as Amicus Curiae in *Christensen* at 4; *Heaton*, 43 F.3d at 1178. Moreover, when requiring their employees to use their accrued compensatory time, the employers in those cases acted pursuant to a unilaterally imposed policy. *See Moreau*, 158 F.3d at 243; *Heaton*, 43 F.3d at 1179. In neither

case did the circuit court address the effect of a negotiated agreement between the parties concerning the preservation and use of compensatory time. *See* Brief for the United States as Amicus Curiae in *Christensen* at I, 7-9, 10-11 n.6; *Heaton*, 43 F.3d at 1180 n.4 ("We take no position on section 207(*o*)(5)'s effect on any additional agreements between the employer and the employees which may limit the time and manner of the employees' use of compensatory time.").

Because neither *Christensen* nor *Heaton* involved a negotiated agreement concerning the use of compensatory time, the Fire District respectfully requests that the Court grant this cross-petition and consider the factual scenario in this case when considering *Christensen*.

C. THE FACTUAL DIFFERENCES PRESENTED BY THIS CASE SUPPORT GRANTING THIS CROSS-PETITION.

The Fire District and the Union in this case negotiated a compensatory time provision and included it in their collective bargaining agreement. When ordering the Firefighters to schedule one or two shifts of compensatory time within a one-month period, the Fire District acted in accordance with that agreement and the understanding of the parties. Even if the Court holds that an employer cannot unilaterally impose a policy under which it compels its employees to use compensatory time, the Fire District respectfully requests that the Court consider whether a public employer can compel

employees to use compensatory time if doing so is consistent with the negotiated agreement between the parties.[3]

CONCLUSION

Because this case presents a question related to that at issue in *Christensen*, the Fire District respectfully requests that the Court grant this cross-petition for writ of certiorari and consider this case when considering *Christensen*.

Respectfully submitted this 4th day of November, 1999.

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[3] Indeed, even the Firefighters recognize that cases involving agreements that contemplate compelling use of compensatory time should be treated differently. *See* Petition for Writ of Certiorari at 8 ("Where a comp time agreement does exist, however, but fails to resolve an unprovided-for situation such as the compelled use of comp time, the presumption should be that the employees – having had no obligation to agree to comp time at all – did not grant such a right to the employer.").

Supreme Court, U.S.
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(2)

No. 99-788

IN THE

Supreme Court of the United States

SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1, a public employer and political subdivision of the State of Washington,

Cross-Petitioner,

v.

GARY COLLINS, *et al.*,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a public employer covered by the overtime and compensatory time provisions of the Fair Labor Standards Act may compel public employees to use their accrued compensatory time absent an express agreement authorizing such compulsion?

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IN THE

Supreme Court of the United States

SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1, a public employer and political subdivision of the State of Washington,

Cross-Petitioner,

v.

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Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The proper dispositions of the primary Petition (No. 99-592) and the Cross-Petition (No. 99-788) are to HOLD the Petition in light of *Christensen* v. *Harris County*, No. 98-1167, *cert. granted*, Oct. 12, 1999, and to DENY the Cross-Petition. The Petition raises the identical question being addressed in *Christensen*, the Ninth Circuit expressly relied upon the decision being reviewed in *Christensen*, and almost any disposition of *Christensen* other than an unqualified affirmance should lead to a GVR of the primary Petition in this case. The Cross-Petition, however, presents a quite different question not posed by the facts of this case, never addressed by the district court or the Ninth Circuit, and not the subject of any split among the circuits. It thus should be denied.

JURISDICTION

Because the Cross-Petitioner prevailed below, both on the general result and on the particular question of whether its actions violated the FLSA, it would seem to lack standing to petition this Court for review, notwithstanding the literal language of 28 U.S.C. § 1254(1). This is particularly so given that Cross-Petitioner's alternative theory for affirmance would not alter the judgment below in any way. (Cross-Respondents note that the Cross-Petition did *not* seek review of the exhaustion issue on which the Ninth Circuit ruled against the Fire District, hence standing may not be based upon any potential effect review of that issue might have.)

STATEMENT OF THE CASE

The facts of this case are fully set out in the Statement of the Case in the primary Petition (No. 99-592). The description of the case set out in the Cross-Petition and the incorporated Response to the Petition, however, is incorrect or misleading in two respects.

First, throughout its Cross-Petition the Fire District claims that this case involves an existing "agreement regarding the preservation and use of compensatory time" and that the Fire District "acted in accordance with that agreement." Cross-Pet. at 3; *see also id.* at 4 (parties "entered into a collective bargaining agreement that governs the preservation and use of compensatory time"); *id.* (order to schedule comp time was "pursuant to the negotiated agreement between the parties"); *id.* at 7 (order to use time "was entirely consistent with the collective bargaining agreement and the understanding and intent of the parties when negotiating the agreement"); *id.* at 8 ("the Fire District acted in accordance with the agreement and the understanding of the parties"). These claims are incorrect. The collective bargaining agreement ("CBA") in this case

does not provide the Fire District a right to compel the use of accrued comp time as it approaches the 144-hour limit. Indeed, the provisions of the CBA demonstrate that the parties contemplated accrual of comp time above 144 hours, and provided an express provision for such a contingency.

The relevant provisions of the CBA in this case are as follows:

> **Section 9.** Shift employees who are required to perform tasks, attend meetings or perform other duties outside their regular shift hours shall receive one and one half hours of comp time off for each hour worked. *If such employees have a total accumulation of more than 144 net hours of comp time at the end of any month*, that is comp time for 96 hours called back, *they will be paid their hourly wage rate for each comp hour in excess of 144 hours on the first pay day of the following month.*
>
> * * *
>
> **Section 11.** Requesting of Comp Time Hours: Employees shall request in writing from the District, at least 64 hours in advance, the number of hours and the date that they want comp time off. The District may deny the request if it deems it necessary. If, on the third request to take comp time hours, the District should deny the request, the District shall pay the employee his/her hour [sic] hourly wage rate for the comp hours requested, unless the denial is because more than two employees have asked to be off at the same time. If a request is made less than 64 hours in advance and denied, it will not count as a denial of a request.

(Emphasis added.) As can be seen from the language of the CBA, it in no way confers upon the Fire District any right to compel the use of comp time in order to keep hours below the 144-hour limit. Indeed, the language directly addresses the contingency that accrued hours would exceed 144, thus showing that the parties contemplated such a situation. And

where the contemplated accumulation did exceed 144 hours, the CBA also provides the sole appropriate response: the employees are to be paid in cash for the excess comp time on the first day of the following month. In the face of this language, it is incorrect to claim that the parties *agreed* that the Fire District could compel the use of comp time to keep accrued comp time below the 144-hour limit. At best the compelled use of comp time is not addressed at all by the agreement and at worst it is implicitly rejected by the structure and interrelationship of the express provisions.

Second, throughout the Fire District's Response to the Petition, which it incorporates by reference into the Cross-Petition, the Fire District makes the slightly different claim that "it was understood that employees would not accrue compensatory time up to the 144-hour cap." Response at 2; *see also id.* at 3 ("The parties' undisputed intent was never that employees could bank their compensatory time up to the cap and receive cash payments on a regular basis at one and one-half times their regular rate of pay."); *id.* (order to use comp time was "consistent with the intent and meaning of the parties' agreement") *id.* n. 2 ("the Firefighters acted contrary to that agreement and the parties' intent"). These claims likewise misstate the plain terms of the CBA and, to the extent they suggest some agreement beyond the terms of the CBA, are merely wishful thinking.

As already noted, the language of the CBA amply demonstrates that the parties not only "understood" that comp time might accumulate in excess of 144 hours, they specifically provided for such a contingency. The language of the CBA is certainly the best evidence of what the parties both "understood" and intended. The Fire District's position thus rests upon a supposed "understanding" that was inconsistent with the express terms of the CBA, was never memorialized in writing, and was certainly not found by the courts below. The Firefighters certainly do not share the Fire District's supposed understanding of what they agreed to concerning comp time.

In the courts below, the Firefighters took the position that the compelled use issue was an unprovided-for situation not expressly covered by any agreement and thus subject solely to the default requirements of the FLSA.[1]

REASONS FOR DENYING THE CROSS-PETITION

The Cross-Petition should be denied because it presents a question not posed by the facts of this case, not addressed by either the district court or the Ninth Circuit below, and not the subject of a split among the circuits. Rather, this case was decided on grounds antecedent to the question raised in the Cross-Petition and neither court below had reason to make the factual or legal findings necessary for this Court adequately to address the question presented in the Cross-Petition.

First, once the factual errors in the Cross-Petition are corrected, this case does not raise the question presented in the Cross-Petition because the Fire District did *not* act "in accordance with [the CBA] when compelling its employees to use compensatory time." The CBA either fails to address such compulsion at all or forbids it by implication. Either way, the CBA does not constitute an agreement that would overcome a default presumption favoring employee control over the use of accrued comp time.

Second, even if it were possible to find a parole agreement allowing compelled use of comp time, no court has yet done so and it is most certainly not the role of this Court to

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[1] *See* Appellants' Reply Brief in the Ninth Circuit, at 5-6 ("A cursory reading of the parties['] collective bargaining agreement reveals that there is no provision that authorizes the Fire District to order an employee to involuntarily use accrued compensatory time off. CR 30 pages 63-69. More to the point, the affidavits submitted by Chiefs Lobdell and Rider on summary judgment do not allege or even infer that the parties to the collective bargaining agreement[] *arrived at an understanding and agreement* whereby the Fire District, by order, could require an employee involuntarily to use accrued compensatory time off. CR 35 and 36.") (emphasis in original).

make such a finding in the first instance. Such a finding is for the courts below, neither of which reached the issue. Rather, both courts found for the Fire District by treating the compelled use of comp time as an unprovided-for situation and finding a default rule favoring the employer. It was thus unnecessary to reach the Fire District's claim that it was affirmatively authorized by agreement to compel the use of comp time. If anything, the district court suggested that the agreement forbade such compulsion and was thus being generous in treating this as merely an unprovided-for situation. *See* Pet. App. B11 ("The District may have breached the collective bargaining agreement, but it did not violate the FLSA.") And in the Ninth Circuit, the court recognized that the CBA "does not specifically address the issue of whether the Fire District may compel Appellants to use comp time." Pet. App. A11 n. 4. Although the Ninth Circuit made a reference to some evidence concerning the alleged intent and assumptions relating to the agreement, it expressly declined to rule on such matters. *Id.*

Third, Cross-Petitioner identifies no split on the issue of whether an affirmative agreement allowing for compelled use of comp time violates the FLSA. The permissible scope of a comp time agreement is an issue subsequent to what the default rule is in the absence of an agreement. Assuming the default rule prohibits compelled use of comp time absent an agreement, the courts below might then address the Fire District's affirmative defense that their compulsion was authorized by agreement. But that defense will involve a plethora of additional issues that are yet to be developed in this case or elsewhere. For example, a court would have to consider what type of agreement – written or oral – is sufficient to overcome the default rule. How specific must the agreement be? Are the requirements different in the context of collectively bargained agreements versus individually obtained agreements? Does a bargaining representative have the right to bargain away the right to control earned comp time? How much con-

trol over comp time may be ceded before it ceases to be compensation at all and hence inconsistent with 29 U.S.C. § 207(*o*)?

These questions will no doubt be influenced by the Court's eventual decision in *Christensen* regarding the default rule for employer control, or lack thereof, over the use of accrued comp time absent an agreement governing such control. But the further questions will require considerable percolation before they are ready for consideration by this Court. They are certainly not ready for consideration in this case, where they have never been addressed at all.

Fourth, on the off-chance that the Court has called for this response due to some newly discovered difficulty in resolving *Christensen* on the merits, this case would still present a favorable vehicle for reaching the default-rule issue. The question on which the Court should grant certiorari under such circumstances is the question presented in the initial Petition (No. 99-592), which the Fire District does not oppose, or the alternatively worded question in this Brief in Opposition to the Cross-Petition. This case provides a favorable vehicle for either of those questions, and would allow the Court to at least consider the issues in the context of a CBA and provide some incidental guidance for the various subsequent questions noted above.

CONCLUSION

For the foregoing reasons, the Cross-Petition (No. 99-788) should be denied and the primary Petition (No. 99-592) should be held in light of *Christensen* v. *Harris County*, No. 98-1167.

Respectfully submitted,

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Dated: February 3, 2000.